IN THE SUPERIOR COURT OF DELAWARE IN AND FOR NEW CASTLE COUNTY

RON'S MOBILE HOMES,)	
)	
Employer -Below,)	
Appellant,)	
)	
v.) C.A. No. N13A-01-002	WCC
)	
JOSEPH H. BROWN,)	
)	
Plaintiff-Below,)	
Appellee.)	

Submitted: October 21, 2013 Decided: November 19, 2013

Upon Appellant's Motion for Reargument – **DENIED**

ORDER

John J. Klusman, Jr., Esquire. Tybout, Redfearn & Pell, 750 Shipyard Dr., Suite 400, Wilmington, DE 19899. Attorney for Appellant/Employer.

Andrew M. Lukashunas, Esquire. Tybout, Redfearn & Pell, 750 Shipyard Dr., Suite 400, Wilmington, DE 19899. Attorney for Appellant/Employer.

Joseph W. Weik, Esquire. 305 North Union Street, 2nd Floor, P.O. Box 2324, Wilmington, DE 19805. Attorney for Appellee/Claimant.

CARPENTER, J.

Upon consideration of the Appellant's Motion for Reargument, the Appellee's Response in Opposition to the Motion, and the record of this case, it appears to the Court that:

- 1. Appellant has moved for reargument of the Court's October 4, 2013 opinion affirming the IAB's decision of January 9, 2013. The Court found that, although Appellee was out of work for 18 months prior to being designated "totally disabled" by his doctor, he had evidenced his intent to remain in the workforce through his contact with his prior employer and reliance on assurances of future employment.
- 2. Appellant moves for reargument, arguing that the Court operated under an incorrect understanding of the time line of Appellee's unemployment. Specifically, Appellant argues that this Court incorrectly stated that Appellee was scheduled for surgery for the injuries in 2011 instead of 2012. Appellant argues that the Court's recitation of an incorrect date for surgery requires the Court to reconsider its findings under a 30 month—rather than 18 month—time span of unemployment.

- 3. A motion for reargument will usually be denied unless the Court has "overlooked a controlling precedent or legal principles, or the court has misapprehended the law or facts such as would have changed the outcome of the underlying decision." A motion for reargument should not be used as a tool to rehash the arguments already decided by the Court and the Court will not hear new arguments that the movant could have previously raised. The movant, Appellant, "has the burden of demonstrating newly discovered evidence, a change in the law, or manifest injustice."
- 4. Appellant has not met this burden. The Court writes first to correct a scrivener's error in the recitation of the date of Appellee's surgery. The Court mistakenly referenced that surgery was schedule for 2011 within the factual and procedural background sections of its opinion. However, the correct year is mentioned within the Court's substantive discussion of the issue on appeal. The Court wishes to make clear, however, that the date of surgery is not dispositive and, in fact, is not even relevant to whether Appellee voluntarily removed himself from the workforce prior to the surgery. Accordingly, the Court hereby denies the Motion for Reargument, finding the error harmless.

¹ Defillipo v. Quarles, 2010 WL 2636855, at *2 (Del. Super. June 30, 2010) (citing Lamourine v. Mazda Motor of Am., 2007 WL 3379048, at *1 (Del. Super. Sept. 24, 2007)).

² Brenner v. Village Green, Inc., 2000 WL 972649, at *1 (Del. Super. May 23, 2000).

³ Id. (citing E.I. duPont de Nemours & Co. v. Admiral Ins. Co., 711 A.2d 45, 55 (Del. 1995)).

5. Appellant's argument that this Court must consider the 30 month time span of unemployment is contrary to established Delaware law. As noted by Appellee, in *Gilliard-Belfast v. Wendy's, Inc.*,⁴ the Delaware Supreme Court considered whether a claimant for disability was entitled to rely on a doctor's order not to return to work. The court highlighted the alternatives:

If a treating physician's order not to work is followed, the claimant risks the loss of disability compensation if the Board subsequently determines that the claimant could have performed some work. Conversely, if the treating physician's order not to work is disregarded, a claimant who returns to work not only incurs the risk of further physical injury but also faces the prospect of being denied compensation for that enhanced injury.⁵

After weighing the options, the court held that "a person who can only resume some form of employment by disobeying the orders of his or her treating physician is totally disabled, at least temporarily, regardless of his or her capabilities." The court found persuasive a prior decision of this Court stating: "[e]ven assuming that claimant could, if absolutely necessary, physically maintain a job of some sort, he nevertheless remains 'disabled' from the viewpoint of workmen's compensation so long as his treating physician insists that he remain

⁴ 754 A.2d 251 (Del. 2000).

⁵ *Id.* at 253.

⁶ *Id.* at 254.

unemployed in order to facilitate his recuperation." Therefore, regardless of the subsequent finding of the

IAB that Appellee was capable of returning to work, he was totally disabled in the eyes of workmen's compensation once designated as such by his treating physician. Accordingly, Appellee was not required to seek employment or otherwise make his intent to remain in the workforce evident after Dr. Balu determined he was totally disabled on November 18, 2011. As such, the Court's reasoning in its Opinion of October 4, 2013 remains sound and will not be disturbed.

6. Although Appellant argues that Appellee unduly persuaded Dr. Balu to designate him as "totally disabled," such is an issue of credibility properly within the purview of the IAB.⁸ Here, the IAB found testimony of Appellee's increased symptoms in the fall of 2011 to be credible and, as stated in this Court's opinion, "[t]he role of the Court is not to overturn the Board's credibility determinations where, as here, such determinations are supported by substantial evidence." These arguments also simply appear to be ones perceived or surmised

⁷ Malcom v. Chrysler Corp., 255 A.2d 706, 710 (Del. Super. 1969).

⁸ See Daimlerchrysler v. W., 2006 WL 1381628, at *4 (Del. Super. May 19, 2006).

by counsel as a result of living with the litigation for a period of time and one not fully developed in the record below.

7. Acc	cordingly, this Court only needed to determine whether Appellee
demonstrated a g	good faith effort to remain in the workforce prior to Dr. Balu's no-
work designation	n. For the reasons stated in this Court's opinion, Appellee did.
Therefore, the M	Iotion for Reargument is hereby DENIED .

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.